92-1738

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1992

RALPH J. ABRAMO, JR.,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

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April 30, 1993

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED FOR REVIEW

I. ARE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION VIOLATED WHEN IDENTICALLY SITUATED CRIMINAL DEFENDANTS ARE SUBJECTED TO DISPARATE CEILINGS OF INCARCERATION PREDICATED UPON THEIR "APPEARANCE" OR THE DEPARTMENT OF THE STATE TRIAL COURT WHICH HAS OBTAINED JURISDICTION?

II. ARE THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION VIOLATED WHEN A STATE COURT CRIMINAL DEFENDANT IS ORDERED TO EXECUTE A FIVE YEAR SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION, PURSUANT TO ONE STATE STATUTE, WHEN TWO OTHER STATE STATUTES PROHIBIT ANY COURT OF SUCH

QUESTIONS PRESENTED FOR REVIEW

STATE FROM ORDERING A DEFENDANT TO EXECUTE A SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION WHICH EXCEEDS TWO AND ONE HALF YEARS IN DURATION?

III. DOES THE VOLUNTARY DISMISSAL OF AN INITIAL CRIMINAL PROSECUTION PRECLUDE A STATE FROM VIABLY CONTENDING THAT ANY PUTATIVE ACT OF WAIVER WITHIN SUCH PROCEEDING REGULATES THE CONSTITUTIONAL RIGHTS WHICH A DEFENDANT MAY ASSERT IN A SECOND CRIMINAL PROSECUTION SUBSEQUENTLY COMMENCED AGAINST HIM?

IV. IF STATUTES RESULT IN AN OVERTLY DISCRIMINATORY CLASSIFICATION IS ONE WHO HAS BEEN INJURED THEREBY REQUIRED TO DEMONSTRATE THAT THE DISCRIMINATION IS PURPOSEFUL OR INTENTIONAL?

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UNOFFICIAL/OFFICIAL REPORTS OR OPINIONS

The trial court, the Worcester Division of the Superior Court Department of the Trial Court (hereinafter "Worcester Superior Court"), did not issue any official or unofficial opinions. On April 8, 1991 the Worcester Superior Court denied the Petitioner's Motion to Dismiss (Pet. App. at p. 11). On November 5, 1991 said Court denied the Petitioner's Massachusetts Rule of Criminal Procedure 30 Motion for Post Conviction Relief together with his Motion for a Required Finding of Not Guilty and his Verified Petition for A Writ of Habeas Corpus Ad Subjiciendum. (Pet. App. at p. 14, 17, 20). The Appeals Court for the Commonwealth of Massachusetts (hereinafter "Appeals Court") issued no official opinion but an unofficial opinion and order were issued by it on December 22, 1992. (Pet. App. at p.

1, 2, 3). The decision by the Appeals Court, affirming the judgments of the trial court, appears in 33 Mass. App. Ct. 1119 (1992) (Pet. App. at p. 4).

The Supreme Judicial Court of the Commonwealth of Massachusetts (hereinafter "Supreme Judicial Court") did not issue an official opinion when it denied discretionary appellate review on February 8, 1993. (Pet. App. at p. 42). The order of the Supreme Judicial Court, denying discretionary appellate review, appears in 414 Mass. 1102 (1993) (Pet. App. at p. 43).

JURISDICTIONAL STATEMENT

The judgment which the Petitioner seeks to review was entered on December 22, 1992 by the Appeals Court. Discretionary appellate review was denied by the Supreme Judicial Court on February 8, 1993. The statutory provision confer-

ring jurisdiction on this Court to review the judgment of the Appeals Court is 28 U.S.C. § 1257(a). The referenced statute provides, in pertinent part, that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the supreme court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . .

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

U.S. Const. amend. XIV, § 1

Federal Statutory Provisions

28 U.S.C. § 1257(a)

Massachusetts Rules of Criminal Procedure

Mass. R. Crim. P. 3

Mass. R. Crim. P. 30

Massachusetts General Laws

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STATEMENT OF THE CASE

The Petitioner, Ralph J. Abramo, Jr., is a male person who, prior to August 29, 1991, had never been convicted of any misdemeanor or felony. On July 6, 1990, the Petitioner was charged with six (6) crimes, three (3) violations of G.L. c. 265, § 13B and three (3) violations of G.L. c. 265, § 23. The initial charges arose by way of a Complaint which was issued by the Uxbridge Division of the District Court Department of the Trial Court. Thereafter, on August 14, 1990, the Petitioner was bound over to the

Worcester Superior Court where he was indicted on November 5, 1990 by a Worcester County Grand Jury. Said Grand Jury returned six (6) True Bills of Indictment, numbered 90-2765, 90-2766, 90-2767, 90-2768, 90-2769 and 90-2770 (hereinafter the "initial indictments"), against the Petitioner.

On March 4, 1991 a Worcester County Grand Jury returned six (6) additional True Bills of Indictment against the Petitioner which were numbered 91-0478, 91-0479, 91-0480, 91-0481, 91-0482 and 91-0483 (hereinafter the "subsequent indictments"). The subsequent indictments charged the Petitioner with the same offenses as contained in the initial indictments, i.e. Rape and Abuse of a Child Under the Age of Sixteen (G.L. c. 265, § 23) and Indecent Assault and Battery on a Child Under the Age of Fourteen (G.L. c. 265, §13B). The Commonwealth

alleged, through the subsequent indictments, that the Petitioner, between November 1, 1989 and July 4, 1990, committed, on "divers dates", several counts of Rape and Abuse of a Child Under the Age of Sixteen (G.L. c. 265, § 23) and Indecent Assault and Battery on a Child Under the Age of Fourteen (G.L. c. 265, § 13B) upon each of the three (3) alleged victims.

On March 21, 1991 the Commonwealth of Massachusetts unilaterally dismissed the initial indictments. No Division of the Massachusetts District Court issued any Complaint relating to the subsequent indictments and the Petitioner has not otherwise appeared, been arraigned or attended a probable cause hearing in any division of the District Court in relation to the felonies contained within the subsequent indictments. On August 29, 1991 the jury returned verdicts of not

guilty on indictments numbered 91-0479, 91-0480, 91-0481 and 91-0483 and the Defendant's Motion for a Required Finding of Not Guilty was allowed in relation to indictment number 91-0478. The jury found the Petitioner guilty on indictment number 91-0482 which indictment charged the Petitioner with Indecent Sexual Assault and Battery upon a Child under the Age of Fourteen (G.L. c. 265, § 13B). (Pet. App. at p. 25, 39). On said date the Petitioner was sentenced to execute and commenced executing a five (5) year term of incarceration at the Massachusetts Correctional Institute, Concord, Massachusetts (hereinafter "MCI Concord"). (Pet. App. at p. 21). MCI Concord is a House of Correction.

The Petitioner appealed both the verdict of the twelve (12) man jury sitting in Worcester Superior Court together with the judgment entered thereon and the

denial by the trial court of the following motions and petition:

A. Motion for a Required Finding of Not Guilty;

B. Mass. R. Crim. P. 30 Motion for Post Conviction Relief;

C. Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum.

The Petitioner timely filed a Motion, Affidavit and Memorandum in Support of a Motion to Dismiss the subsequent indictments, Motions for a Required Finding of Not Guilty (at the close of the Commonwealth's case, at the close of the Petitioner's case and within five (5) days of the jury having been discharged), a Mass. R. Crim. P. 30 Motion for Post Conviction Relief together with an Affidavit and Memorandum in Support of same and a Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum accompanied by an Affidavit and a Memorandum. The Petitioner renewed his Motion to Dismiss

the subsequent indictments on August 28, 1991 which date was the first day of trial.

On February 4, 1993, the Petitioner was released from a minimum security facility (House of Correction). The Petitioner is currently and will be subject to numerous parole conditions up to and including August 28, 1996. (Pet. App. at p. 44). In short, the Petitioner is still in the custody of the Commonwealth of Massachusetts and will be up to and including August 28, 1996. "While the Petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of [Massachusetts] Parole Board within the meaning of the habeas corpus statute.." Jones v. Cunningham, 371 U.S. 236, 243 (1963).

This case has been before this Court on a previous occasion. On June 13, 1991 the Petitioner filed a Renewed Application to Stay State Court Criminal Proceedings with the late Mr. Justice Marshall who referred same to the Court. The Court denied such application on June 24, 1991. Abramo v. Worcester Division of the Superior Court, Etc., ___ U.S. ___, 115 L.Ed. 2d 1015, 111 S.Ct. 2846 (1991). The initial application was addressed to and denied by the Circuit Justice, Mr. Justice Souter.

STAGE OF PRIOR PROCEEDINGS AT WHICH FEDERAL QUESTIONS WERE RAISED AND MANNER IN WHICH THEY WERE DETERMINED BY TRIAL AND APPELLATE COURTS

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleadings timely filed in the Worcester Superior

Court at the indicated stage:

Pleading	Stage
Motion for a required finding of not guilty	Within five (5) days of the Jury having been discharged: 9/6/91 Denied: 11/5/91
Motion to Dismiss	Prior to Trial: 4/2/91 Denied: 4/8/91
Renewed Motion to Dismiss	Prior to Trial: 8/28/91 Denied: 8/28/91
Mass. R. Civ. P. 30 Motion for Post Conviction Relief	Post Trial: 10/22/91 Denied: 11/5/91
Verified Petition for A Writ of Habeas Corpus Ad Subjiciendum	Post Trial: 10/18/91 Denied: 11/5/91

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleadings timely filed in the Appeals Court at the indicated stages:

Pleading	Stage
Notice of Appeal	Filed: 9/26/91
Notice of Appeal	Filed: 12/2/91
Appellate Brief	Appeal: 3/11/92

On December 22, 1992 the Appeals Court affirmed the judgment of the Worcester Superior Court and the denials by the said court of the Petitioner's Motion For a Required Finding of Not Guilty, his Mass. R. Crim. P. 30 Motion For Post Conviction Relief and his Verified Petition For A Writ Of Habeas Corpus Ad Subjiciendum.

The Petitioner raised the federal questions sought to be reviewed by this petition through the following pleading timely filed in the Supreme Judicial Court at the indicated stage:

Pleading	Stage
Application For Leave To Obtain Further (Discretionary) Appellate Review	Filed: 12/29/92 Denied: 2/8/92

ARGUMENT IN SUPPORT OF ALLOWANCE OF WRIT

I. THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

ARE VIOLATED WHEN IDENTICALLY SITUATED CRIMINAL DEFENDANTS ARE SUBJECTED TO DISPARATE CEILINGS OF INCARCERATION PREDICATED UPON THEIR "APPEARANCE" OR THE DEPARTMENT OF THE STATE TRIAL COURT WHICH HAS OBTAINED JURISDICTION

The trial courts of the Commonwealth of Massachusetts are comprised of the Land Court, Probate Court, District Court and Superior Court. The District and Superior Courts are situated throughout the Commonwealth of Massachusetts in the various counties. The Appeals Court is an intermediate court of appeal. The final appellate court within the Commonwealth is the Supreme Judicial Court. With but few exceptions not applicable to the instant case, further appellate review by the Supreme Judicial Court of a decision by the Appeals Court is discretionary in nature. The Worcester Superi-

or Court sentenced the Petitioner to execute a five (5) year term of incarceration at MCI Concord subsequent to his trial and conviction for having allegedly violated G.L. c. 265, § 13B. (Pet. App. at p. 21, 39).

The basis of the Petitioner's constitutional argument is that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution are violated when Superior Court defendants are subjected to a ceiling of incarceration of 10 years for a first time violation of G.L. c. 265, § 13B while identically situated District Court defendants are subjected to a ceiling of incarceration of only 2.5 years. G.L. c. 218, § 26, G.L. c. 265, § 13 B, G.L. c. 279, § 23, G.L. c. 218, § 27, G.L. c. 274, § 1. It is apparent that such a disparity (7.5 years) violates the mandates imposed by the Equal Protection

and Due Process Clauses of the Fourteenth Amendment.

G.L. c. 218, § 26 provides that the District Court "shall have original jurisdiction, concurrent with the Superior Court, [over the offense of] ... indecent assault and battery on a child under fourteen years of age." G.L. c. 279, § 23 precludes District Courts from ordering a male prisoner to execute a sentence of incarceration in a jail or house of correction for a period longer than 2.5 years. Since G.L. c. 265, § 13B allows only for incarceration in a State Prison, House of Correction or Jail and since a District Court cannot sentence to a state prison, the maximum sentence which the District court can impose, without suspending same, for a violation of G.L. c. 265, § 13B is 2.5 years regardless of first offender or habitual offender status. See G.L. c. 218, § 27; G.L. c.279,

§ 23; G.L. c. 265, § 13B; G.L. c. 218, § 26. Alternatively, the Superior Court may sentence a first time offender, with no previous criminal record, to a ten (10) year term of incarceration upon being convicted for having violated G.L. c. 265, § 13B. See G.L. c. 265, § 13B; G.L. c. 274, § 1; G.L. c.218, § 27, G.L. c. 279, § 23. Therefore, depending solely upon the fortuitous circumstance of the particular trial court (District Court or Superior Court) in which a defendant is tried, there exists a 7.5 year statutory disparity between the ceilings of incarceration.

The issue here is quite simple. Is it constitutional to treat identically situated individuals (first time offenders having no previous criminal records) who have been charged with the identical criminal offense (G.L. c. 265, § 13B) in a dissimilar fashion by subjecting them

to disparate ceilings of incarceration? The Petitioner respectfully submits that the answer must be in the negative. It has long been held that "in the administration of criminal justice no different or higher punishment should be imposed upon one than such is prescribed to all for like offenses". Barbier v. Connolly, 113 U.S. 27, 31 (1885). The "Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants..." Williams v. Illinois, 399 U.S. 235, 244 (1970).

Section One of the Fourteenth Amendment of the United States Constitution reads as follows:

AMENDMENT XIV [1868]

> SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and

> of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The threshold inquiry, in any case in which an Equal Protection Clause violation is asserted, is to determine the level of scrutiny to be applied to the allegedly illegal classification. "In determining whether a class based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." Plyler v. Doe, 457 U.S. 202, 217 & n.15 (1982). Liberty is defined within the confines of the Due Process Clause as the right "..generally to enjoy those

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment." Ingraham v. Wright, 430 U.S. 651, 673-674 (1977)(footnote omitted.)

Since the Petitioner has been subjected to incarceration and will be subjected to numerous parole conditions, as a consequence of his having been convicted for allegedly violating G.L. c. 265, § 13B, an interest explicitly protected under the Due Process Clause has been and continues to be implicated. The Defendant, having been convicted under G.L. c. 265, § 13B, has been classified as a

felon and deprived of the freedom ". . to be with family and friends and to form the other enduring attachments of normal life". Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Meachum v. Fano, 427 U.S. 215 (1976). Since the Petitioner has been and is currently subjected to the deprivation of his liberty interests, explicitly and implicitly protected by the Due Process Clause, strict scrutiny analysis must be applied to any classification which unequally disadvantages the Petitioner in relation to these fundamental rights. Plyler v. Doe, 457 U.S., at 217 & n. 15.

The Petitioner acknowledges that a State has a liberal right to enact statutes to combat particular problems of a varying nature. "The range of discretion that a state possesses in classifying objects of legislation ... may be excused from [expression], in view of [this

Court's] very recent decisions. The power may be determined by degrees of evil, or exercised in cases where detriment is specially experienced." Armour & Co. v. North Dakota, 240 U.S. 510, 517 (1916). The severity of the potential ceiling of incarceration for violating G.L. c. 265, § 13B is not here challenged by the Petitioner since it is conceded that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). Likewise, the Petitioner is cognizant of the fact that "the Fourteenth Amendment does not require that state laws shall be perfect; and we cannot judicially denounce [statutes] as based upon arbitrary distinctions, in view of the wide discretion that must necessarily reside in a state legislature about resorting to classification when establish-

ing regulations for the welfare of those for whom they legislate". Missouri, Kansas & Texas Ry. v. Cape, 233 U.S. 642 650 (1914). See also Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 238, 293 (1897). Accordingly, the Petitioner does not contest the maximum levels of incarceration superficially delineated in G.L. c. 265, § 13B. The Petitioner does, however, contest the classification which allows some Defendants (those tried and convicted in a District Court) to arbitrarily and fortuitously escape the enhanced ceiling of incarceration to which only Superior Court Defendants are subjected. See G.L. c. 265, § 13 B, G.L. c. 218, § 27, G.L. c. 279, § 23, G.L. c. 218, § 26, G.L. c. 274, § 1.

It must here be noted that the Petitioner's attack on this statutory scheme is not an attempt to wrest from a sentencing judge the plenary power which he

or she retains in determining the type and kind of punishment to be inflicted upon a particular Defendant. See Williams v. Illinois, 399 U.S. 235, 243 (1970). It is the prerogative of a sentencing judge to sentence particular defendants to disproportionate terms of incarceration predicated upon the factual circumstances extant in each case. However, the present statutory framework essentially and illegally "precludes a [District Court] judge from imposing on ... any defendant the maximum penalty provided by law." Williams v. Illinois, 399 U.S., at 243. No matter how "bad" an "actor" the District Court defendant is, a District Court Judge may not legally sentence him to execute a term of incarceration exceeding 2.5 years even though the substantive criminal statute (G.L. c. 265, § 13B) allows for convicted first time offenders to be incarcerated for 10

years. See G.L. c. 265, § 13B; G.L. c. 218, § 26; G.L. c. 218, § 27; G.L. c. 279, § 23. Since the disproportionate ceilings of potential incarceration are imposed prior to trial, without a determination of guilt, without an inspection of the gruesomeness of the Defendant's alleged conduct, without an inspection of the Defendant's background and without an inspection of the various other factors utilized to determine the term of incarceration to be imposed, the Commonwealth cannot viably assert that the Defendant is attempting to strip the sentencing power from the judicial branch.

The unequal deprivation of liberty interests present here dictates that the Commonwealth must demonstrate that such a deprivation is "necessary to protect a compelling and substantial governmental interest". Dunn v. Blumstein, 405 U.S. 330, 341 (1972) (quoting Oregon v. Mit-

chell, 400 U.S. 112, 238 (1970)). It must be remembered that: "[s]tatutes affecting constitutional rights must be drawn with 'precision', and must be 'tailored' to serve their legitimate objectives". Dunn v. Blumstein, 405 U.S., at 343 (citations omitted.) It is apparent that the dispositive inquiry in this case becomes whether or not the Commonwealth of Massachusetts is capable of demonstrating the existence of a compelling governmental interest which makes necessary the discrimination to which Superior Court defendants are currently subjected.

M.G.L. c. 218, § 30 dictates that a District Court may:

> [c]ommit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. (emphasis added).

The Commonwealth cannot logically assert that it has a compelling govern-

mental interest in imposing a 2.5 year ceiling of incarceration on one class of criminal Defendants while imposing a 10 year ceiling on other identically situated Defendants predicated upon a first blush "appearance" of innocence or lack of same. This classification is in contravention of Fourteenth Amendment jurisprudence and the dictate of Barbier v. Connolly since it would impose a different or higher punishment ". . upon one than such is prescribed to all for like offenses". Id. 113 U.S., at 31.

Prior to conviction, a Defendant is presumed to be innocent of all felonies or misdemeanors with which he has been charged. Therefore, when an individual is subjected to the threat of increased terms of incarceration by virtue of his "appearance" of guilt he is deprived of the referenced constitutional right. "The principle that there is a presump-

tion of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895); see also Taylor v. Kentucky, 436 U.S. 478, 483 (1978).

The unequal deprivation of an individual's liberty interests predicated solely upon his "appearance" is the very capriciousness which the Equal Protection Clause proscribes. G.L. c. 218, § 26, G.L. c. 218, § 27, G.L. c. 218, § 30, G.L. c. 279, § 23 and Rule 3(e) of Mass. R. Crim. P. may be utilized in conjunction with G.L. c. 265, § 13B, which itself thereby becomes unconstitutional, to arbitrarily expose a Defendant to incarceration for much lengthier periods if tried, convicted and sentenced in the Superior Court than would be possible were the proceeding to occur in the Dis-

trict Court. A multitude of circumstances can be envisioned where oppression, collusion, fraud and politics may determine the potential ceiling of a Defendant's incarceration. [N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation.." Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

Likewise, the unilateral and absolute power of the Commonwealth of Massachusetts, whether exercised by whim, political intervention or otherwise, to dole out different levels of punishment predicated upon the Trial Court in which the Defendant is tried (District v. Superior) is not necessitated by a "compelling governmental interest" which could justify this discriminatory treatment. See Dunn v. Blumstein, 405 U.S. 330, 342, 343 (1972). "It is not, under any view,

the mere tribunal into which a person is authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail." Cincinnati Street Railway Company v. Snell, 193 U.S. 30, 37 (1904).

When it is demonstrated that there exists, as there does here, an invidious classification violative of the Equal Protection Clause then there is, necessarily, a concurrent violation of the Due Process Clause. See Loving v. Virginia, 388 U.S. 1, 12 (1967). "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of

due process." Bolling v. Sharp, 347 U.S. 497, 499 (1954).

Since the classification at issue here trammels upon fundamental rights this Court presumes the unconstitutionality of the statutory discrimination. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). The onus is now clearly upon the Commonwealth of Massachusetts to demonstrate that the referenced statutory framework is constitutional.

II. THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION ARE VIOLATED WHEN A STATE COURT CRIMINAL DEFENDANT IS ORDERED TO EXECUTE A FIVE YEAR SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION, PURSUANT TO ONE STATE STATUTE, WHEN TWO OTHER STATE STATUTES PROHIBIT ANY COURT OF SUCH STATE FROM ORDERING A DEFENDANT TO EXECUTE A

SENTENCE OF INCARCERATION IN A HOUSE OF CORRECTION EXCEEDING TWO AND ONE HALF YEARS IN DURATION

On August 29, 1991 the Petitioner was sentenced to execute a five (5) year term of incarceration at MCI Concord which facility is correctly characterized as a House of Correction. See G.L. c. 126, § 8; G.L. c. 279, § 33. When an individual is convicted for having violated G.L. c. 265, § 13B, said statute and G.L. c. 279, § 23 dictate that he may not be compelled to execute a sentence of incarceration in a jail or house of correction which exceeds two and one half years. Alternatively, G.L. c. 279, § 33 states that a person may be compelled to execute a sentence of incarceration for a period greater than 2.5 years at MCI Concord if the term of the imposed incarceration is for a period greater than 2.5 years and the incarceration results from

the alleged commission of a felony. See G.L. c. 279, § 33. Since a violation of G.L. c. 265, § 13B is a felony [see G.L. c. 265, § 13 B, c. 274, § 1] and since the term of incarceration here at issue was to have been greater than 2.5 years, G.L. c. 279, § 33 "allowed" the sentencing judge to compel the Petitioner to execute a sentence of incarceration greater than 2.5 years in a house of correction. This power and its utilization clearly derogate from the mandates imposed by the Fourteenth Amendment and G.L. c. 265, § 13B and G.L. c. 279, § 23.

G.L. c. 279, § 33 violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution since said statute prescribes a higher punishment for some individuals, identically circumstanced with others, than is provided for in G.L. c. 265, § 13B and G.L. c. 279, § 23. See

Williams v. Illinois, 399 U.S. 235 (1970); Barbier v. Connolly, 113 U.S., at 31 (1885). Necessarily, G.L. c. 279, § 23 and G.L. c. 265, § 13B must define the permissible punishment since "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971); see also United States v. Bass, 404 U.S. 336, 347 (1971). After all, "the touchstone of due process is the protection against the arbitrary action of the government" necessarily dictating that the least onerous statutes are the only statutes which may be utilized to determine the length and ceiling of a Defendant's incarceration. Wolf v. McDonnell, 418 U.S. 539, 558 (1974). "[A] person's liberty [interest] is equally protected, even when the liberty itself is a statutory creation of the State". Wolf, 418 U.S., at 558.

It is clear that the above delineated classification fails to withstand strict scrutiny analysis. There can be no compelling governmental interest in subjecting defendants to such disparate treatment when viewed in light of the goals of the criminal laws and constitutional dictates. See Plyler, 457 U.S., at 202 (1982); Bass, 404 U.S., at 347, Barbier, 113 U.S., at 31.

It cannot be logically contended that G.L. c. 279, § 33 is necessary to preserve a judge's post conviction sentencing powers. Under the current statutory scheme a District Court judge cannot sentence a Defendant to execute a term of incarceration exceeding 2.5 years. G.L. c. 279, § 23; G.L. c. 218, § 27; G.L. c. 265, § 13B. Therefore, since a District Court judge is statutorily precluded from sentencing any Defendant to execute a term of incarceration at MCI Concord or

any other House of Correction or Jail exceeding 2.5 years, said judge need not avail himself of G.L. c. 279, § 33 to fully "exercise" his post conviction sentencing power. Similarly, Superior Court judges need not utilize G.L. c. 279, § 33 to incarcerate a Defendant beyond 2.5 years for violating G.L. c. 265, § 13B since they may order convicted first time offenders to execute sentences of up to 10 years in alternative penal institutions. See G.L. c. 279, § 23, G.L. c. 218, § 27, G.L. c. 265, § 13B, G.L. c. 274, § 1. Therefore, neither District Court judges nor Superior Court judges need rely upon G.L. c. 279, § 33 in order to utilize fully their post conviction sentencing power.

III. THE VOLUNTARY DISMISSAL OF AN INITIAL CRIMINAL PROSECUTION PRECLUDES A STATE FROM CONTENDING THAT ANY ASSERTED ACT OF WAIVER WITHIN SUCH

PROCEEDING REGULATES THE CONSTITUTIONAL RIGHTS WHICH A DEFENDANT MAY ASSERT IN A SECOND CRIMINAL PROSECUTION SUBSEQUENTLY COMMENCED AGAINST HIM

No Division of the Massachusetts District Court issued any Complaint relating to the subsequent indictments and the Petitioner has not otherwise appeared, been arraigned, been bound over from or attended a probable cause hearing in any division of the District Court in relation to the felonies contained within the subsequent indictments. The procedural history of this case has never been contested by the Commonwealth. On page twenty-one (21) of its brief filed in the Appeals Court the Commonwealth stated, in footnote eleven (11), that:

> The Commonwealth notes that the indictments arising out of the initial district court complaints were dismissed at bar. Defendant, therefore, appeals

from a conviction in a prosecution begun by direct indictment in the Superior Court.

Despite its admission that the second criminal prosecution was never subjected to the jurisdiction of the District Court, the Commonwealth has persisted in contending that the Petitioner "raised no challenge to the bind-over process [G.L. c. 218, § 30] in the District Court." Consistent with this position, the Commonwealth has continually asserted that "by not raising his constitutional claims until the case was entered in the Superior Court, Petitioner waived his opportunity to challenge the district court process [G.L. c. 218, § 30]".

The Commonwealth's assertions that the Petitioner has waived constitutional claims and rights constitutes a misunderstanding of the nature, effect and impact of the dismissal of the initial indict-

ments and the constitutional infirmities upon which the Petitioner relies. The Petitioner could not have raised any challenge to the bind-over procedure in the District Court since the second criminal prosecution, unlike the initial criminal prosecution, was never subjected to the jurisdiction of any division of the District Court. "A criminal charge, strictly speaking, exists only when a formal written complaint has been made against the accused and a prosecution initiated." United States v. Patterson, 150 U.S. 65, 68 (1893). "In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge." Id., 150 U.S., at 68. On two distinct occasions the Commonwealth initiated criminal prosecutions against the Petitioner which actions required him to answer to such charges.

A determination that a putative waiver by the Petitioner, in the initial prosecution, regulated the fundamental rights which he could have asserted in a subsequent criminal prosecution would violate this Court's precedent relating to waivers in criminal cases and would, concurrently, contravene the Due Process Clause. Waivers in criminal cases must be "voluntary, knowing, and intelligently made . . . " D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972). There must be "an intentional relinquishment or abandonment of a known right or privilege ... Johnson v. Zerbst, 304 U.S. 458, 464 (1938). [A]s the Court has even said in the civil area, '[W]e do not presume acquiescence in the loss of fundamental rights..'" D. H. Overmyer Co., 405 U.S., at 186 (quoting Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937)). It cannot be logically

posited by the Commonwealth that any ostensible waiver by the Petitioner in the initial criminal prosecution constitutes a voluntary, knowing and intelligent waiver of fundamental constitutional rights enuring to his benefit in a criminal prosecution which had yet to be commenced. Necessarily, a waiver under these circumstances could not possibly be characterized as having been voluntarily, knowingly and intelligently made. There could not have been, in these circumstances, "an intentional relinquishment or abandonment of a known right or privilege ... " Johnson, 304 U.S., at 464.

The application of the doctrine of waiver to the facts of this case would also violate the fundamental proscriptions of the Due Process Clause. See Wolf, supra. Nothing could be more arbitrary than to allow the government to enforce the "transfer" of waivers from

one criminal prosecution to another at its own whim and caprice. Due process embodies "'fundamental conceptions of justice which lie at the base of our civil and political institutions,' Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340, 98 ALR 406 (1935), and which define 'the community's sense of fair play and decency,' Rochin v. California, supra, at 173, 96 L. Ed. 183, 72 S. Ct. 205, 25 ALR 2d 1396." United States v. Lovasco, 431 U.S. 783, 790 (1977). The "fair play" and "decency" commanded by the Due Process Clause would be massacred if an individual were to be deemed to have voluntarily, knowingly and intelligently waived fundamental federal constitutional rights in a criminal prosecution not yet commenced as a consequence of a waiver alleged to have occurred in a prior criminal prosecution which had been dismissed.

Even assuming, arguendo, that the first and second criminal prosecutions should be considered as one, there could still not have been a waiver by the Petitioner in this case. The basis of the Petitioner's constitutional arguments is that the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution are violated when Superior Court defendants face potential incarceration of 10 years for a first time violation of G.L. c. 265, § 13B while identically situated District Court defendants are subjected to potential incarceration of only 2.5 years. Necessarily, the Petitioner could not have tenably asserted, in the District Court, the existence of a violation predicated upon the Equal Protection or Due Process Clauses since the onerous aspects of this statutory scheme are not visited upon District Court defendants. Federal

constitutional jurisprudence has long dictated that:

> [O]ne who would strike down a state statute as violative of the Federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution.
>
> Southern R. Co. v. King, 217 U.S. 524, 534 (1910).

Since the unconstitutional features of the relevant statutes applied only to Superior Court Defendants, it would have been legally impossible for the Petitioner to have challenged the constitutional infirmities of the bind over procedure (G.L. c. 218, § 30) or the disparate ceilings of incarceration while he was subjected to the jurisdiction of the District Court. It is also noteworthy to point out that the Petitioner never di-

rectly challenged the propriety of the bind over procedure. His constitutional attack upon G.L. c. 218, § 30 was and is one aimed at demonstrating that same does not constitute a compelling governmental interest. Indeed, this is consistent with the fact that the Petitioner was never subjected to the provisions of G.L. c. 218, § 30 since the subsequent criminal prosecution was begun by direct indictment in the Worcester Superior Court.

The Petitioner is not unaware of the fact that the disposition of the above articulated issues "may place a further burden on [Massachusetts] in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge has permitted to stand. But the constitutional imperatives of the Equal Protection

Clause must have priority over the comfortable convenience of the status quo." Williams v. Illinois, 399 U.S. 235, 245 (1970). It must be remembered that no Court is "at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as [it may] deem the Defendant innocent or guilty". Hill v. Texas, 316 U.S. 400, 406 (1942.) If there is a differentiation in treatment, which is unjustified, the query truly is "whether the difference does injustice to the class generally, even though it bears hard in some particular case. . ." Bain Peanut Co. v. Pinson, 113 U.S. 499, 501 (1931).

It is, on this late date, unquestionable that "[i]f the court which renders a judgment has no jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any

other reason, the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged . . ." Re Nielson, 131 U.S. 176, 182 (1889); see also Ex Parte Royal, 117 U.S. 241 (1886); Re Mills, 135 U.S. 263 (1890); Graham v. Weeks, 138 U.S. 461 (1891); Pollard v. United States, 352 U.S. 354 (1957).

IV. IF STATUTES RESULT IN AN OVERTLY DISCRIMINATORY CLASSIFICATION ONE WHO HAS BEEN INJURED THEREBY IS NOT REQUIRED TO DEMONSTRATE THAT THE DISCRIMINATION IS PURPOSEFUL OR INTENTIONAL

Purposeful discrimination is normally a condition precedent to the assertion of a viable Equal Protection Clause claim. See Mobile v. Bolden, 446 U.S. 55 (1980). However, "[a] showing of discriminatory intent is not necessary when the equal protection claim is based on an

overtly discriminatory classification." Wayte v. United States, 470 U.S. 598, 608 & n. (10); Strauder v. West Virginia, 100 U.S. 303 (1880). The facially discriminatory statutory framework delineated above precludes the presentment of a tenable contention that these statutes do not perpetuate anything but "an overtly discriminatory classification." Clearly, the Petitioner need not show purposeful discrimination in this circumstance. Even assuming, arguendo, that the Petitioner is in need of demonstrating purposeful discrimination he is easily capable of such task. This Court is "..not confined to the language of the statute under challenge in determining whether that statute has any discriminatory effect." American Motorist Ins. Co. v. Starnes, 425 U.S. 637, 645 (1976). The discriminatory effect of the statutory scheme here challenged has been noted by

both legal commentators and the press alike. The notes to Mass. R. Civ. P. 3 read as follows:

> General Laws c. 218, §§ 26-27 and c. 279, § 23, when construed together, have led to the settled practice of the District Court, although having jurisdiction of felonies punishable by less than five years at Walpole, sentencing to a jail or house of correction for not more than two and one half years.

On Friday January 1, 1993 a Boston Globe newspaper columnist (Doris Sue Wong) noted, in relation to a pending criminal case subject to the concurrent jurisdiction of both the Superior and District Court Departments, that "[r]ather than allowing the case to remain in a [District Court], the [Assistant District Attorney] sought direct indictments sending the matter to Superior Court, where penalties are stiffer." The discriminatory purpose of the statutes in question have been proven by their facial language

and noted by both legal commentators and members of the press. It is without doubt that these statutes effect a discriminatory purpose. See Wayte v. United States, Strauder v. West Virginia and American Motorist Ins. Co. v. Starnes.

CONCLUSION

It is requested that the within Petition be granted because "there are special and important reasons therefor." Sup. Ct. R. 10. .1. The Massachusetts Appeals Court "has decided an important question of federal law . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10. .1.(c). Thousands have, are or will be incarcerated, in abrogation of their fundamental rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, in the absence of review by this Court. The legal issues raised in this

Petition are, necessarily, of grave public concern.

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92-1738
No.

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1992

RALPH J. ABRAMO, JR.,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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April 30, 1993

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

92-P-145

COMMONWEALTH

vs.

RALPH J. ABRAMO, JR.

MEMORANDUM AND ORDER UNDER RULE 1:28

The defendant was convicted of indecent assault and battery on a child under the age of fourteen. First charged in the District Court, he was later bound over for trial in the Superior Court under G. L. c. 218, § 30. His main argument on appeal is that § 30 is unconstitutional on due process and equal protection grounds because of the disparity of sentencing options in the two courts for the crime of which he was convicted. For reasons set forth in Commonwealth v. Hudson, 404 Mass. 282,

289 (1989), the defendant's constitutional arguments are without merit.[1]

In view of the testimony of the victim, there was no error in the denial of the defendant's motion for a required finding of not guilty.

Judgment affirmed.

Order denying motions for post-conviction relief affirmed.

By the Court (Dreben, Fine & Laurence, JJ.)

Nancy Turk Foley /s/
Clerk

Entered: December 22, 1992

---

[1]We need not reach other of the Commonwealth's arguments which may also defeat the defendant's constitutional claims.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, DECEMBER 22, 1992

IN THE CASE OF

COMMONWEALTH

vs.

RALPH J. ABRAMO, JR.

pending in the Superior
Court for the County of Worcester

Ordered, that the following entry be made in the docket; viz.,--

Judgment affirmed.

Order denying motions for post-conviction relief affirmed.

BY THE COURT,

Nancy Turk Foley /s/, Clerk

December 22, 1992

Note: OVER

The original of the within rescript will issue in due course, pursuant to M R A P 23 APPEALS COURT

Decisions Pursuant to Rule 1:28

December 22, 1992

COMMONWEALTH vs. RALPH J. ABRAMO, JR. No. 92-P-145. Judgment affirmed. Order denying motions for post-conviction relief affirmed.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

WORCESTER SUPERIOR COURT

DOCKET NUMBER: 91-0482

COMMONWEALTH OF MASSACHUSETTS	)	
v.	)	NOTICE OF APPEAL
RALPH J. ABRAMO, JR., Defendant	)	

TO THE CLERK OF THE ABOVE-NAMED COURT:

Notice is hereby given pursuant to, consistent with and under the purview of Rules 3 and 4 of the Massachusetts Rules of Appellate Procedure, that the Defendant in the above-captioned case, Ralph J. Abramo., Jr., appeals the orders/judgment of the Worcester Division of Superior Court Department of the Trial Court which Court denied the following petition/motions on November 5, 1991:

1. Defendant's Mass. R. Crim. P. 30 Motion for Post Conviction Relief.

2. Defendant's Motion for a Required Finding of Not Guilty.

3. Defendant's Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum.

Ralph J. Abramo, Jr., Defendant
By His Attorneys,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By: Brendan J. Perry /s/
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BBO# 395640
Christopher M. Perry
BBO# 552203
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DATED: December 2, 1991

*Filed
Dec 2 1991
ATTEST
Loring P. Lamoureux /s/, Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

WORCESTER SUPERIOR COURT
DOCKET NO: 91-0482

COMMONWEALTH OF MASSACHUSETTS	)	
v.	)	NOTICE OF APPEAL
RALPH J. ABRAMO, JR.,	)	

TO THE CLERK OF THE ABOVE-NAMED COURT:

Notice is hereby given pursuant to, consistent with and under the purview of Rules 3 and 4 of the Massachusetts Rules of Appellate Procedure that the Defendant appeals the judgment of the Worcester Division of Superior Court Department of the Trial Court, entered on August 29, 1991, in relation to indictment number 91-0482, to the Appeals Court for the Commonwealth of Massachusetts.

The Appeals Court has jurisdiction pursuant to, consistent with and under the purview of M.G.L. c.211A § 10.

Ralph J. Abramo, Jr., Defendant
By His Attorneys,
BRENDAN J. PERRY & ASSOCIATES, P.C.

By: Brendan J. Perry /s/
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BBO # 395640
Christopher M. Perry
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(508) 429-2000

Dated: September 26, 1991

*Filed
Sep 26 1991
ATTEST
Loring P. Lamoureux /s/, Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
DEPARTMENT OF THE TRIAL COURT
CRIMINAL NO: ~~91-078~~
~~91-079~~
~~91-080~~
91-0478 ~~91-081~~
~~91-082~~
~~91-083~~

COMMONWEALTH OF MASSACHUSETTS	)	
	)	
	)	DEFENDANT'S MOTION
VS.	)	TO DISMISS
	)	
RALPH J. ABRAMO, JR.,	)	

Comes now the Defendant in the above-captioned case and moves this Honorable court pursuant to, consistent with and under the purview of Rule 13 of the Massachusetts Rule of Criminal Procedure to dismiss all of the above-numbered indictments which charge the Defendant with three Counts of M.G.L C.265 § 13(B) and three Counts of M.G.L. C.265 § 23.

As grounds in support of the within Motion, the Defendant states and avers as follows:

A. Dismissal of Indictments Relating to M.G.L. C.265 § 13(B)

1. The Defendant, in relation to M.G.L. C.265 § 13(B), is conceivably susceptible to the following terms of incarceration if convicted in the referenced Courts.

	District
1st Offense	2.5 yrs
2nd Offense	2.5 yrs
3rd Offense	2.5 yrs
	Superior
1st Offense	10 yrs
2nd Offense	Life
3rd Offense	Life
	Disparity
1st Offense	7.5 yrs
2nd Offense	Life - 2.5 yrs
3rd Offense	Life - 2.5 yrs

2. M.G.L. C.218 § 26 allows a District Court to retain jurisdiction over an asserted violation of M.G.L. C.265 § 13(B).

3. M.G.L. C.279 § 23 precludes a District Court from ordering male prisoner to execute a sentence of imprisonment for period greater than two and one half years in a jail or house of correction.

4. M.G.L. C.265 § 13(B) only allows for an individual to be punished in a state prison, jail or house of correction.

5. A District Court is unable to sentence a Defendant, found to be guilty of committing M.G.L. C.265 § 13(B), to a state prison. M.G.L. C.218 § 27.

*A true copy by photostatic process.
Attest: Kathleen F. Capurso /s/, Asst. Clerk
*4/8/91 Denied
H.F. Travers, Jr. JSC /s/

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

WORCESTER SUPERIOR

DOCKET NO: 91-0482

COMMONWEALTH OF MASSACHUSETTS	)
	) DEFENDANT'S MASS.
	) R. CRIM. P. 30
v.	) MOTION FOR POST-
	) CONVICTION RELIEF
RALPH J. ABRAMO, JR.,	)
Defendant	)

Now comes the Defendant in the above captioned case and moves this Honorable Court, pursuant to, consistent with and under the purview of Mass. R. Crim. P. 30, to reverse the judgment entered in relation to the felony set forth in indictment number 91-0482, to issue any and all process necessary, including, but not limited to a Writ of habeas Corpus Ad Subjiciendum, to effectuate Defendant's immediate and permanent release from the physical confinement, currently being imposed upon him by the Commonwealth which confinement is illegal and "imposed

in violation of the Constitution ... of the United States" of America. Mass. R. Crim. P. 30(a).

As grounds in support of the within motion the Defendant states and avers as follows:

1. A Defendant found guilty of violating M.G.L. C.265 § 13(B) is susceptible to the following terms [ceilings] of incarceration if convicted in the referenced Courts:

Offense	District
First	2.5 yrs
	Superior
First	10 yrs
	Disparity
First	7.5 yrs

2. M.G.L. C.218 § 26 allows a District to refrain jurisdiction over an asserted violation of M.G.L. C.265 § 13(B).

3. M.G.L. C. 279 § 24 precludes a District Court from ordering male prisoner to execute a sentence of imprisonment for a period greater than two and one half years in a jail or house of correction.

4. M.G.L. C.265 § 13(B) only allows an individual to be punished for allegedly violating such statute, in a state prison, jail or house of correction.

* A true copy by photostatic process. Attest: Karen A. Zona /s/, Dep. Asst. Clerk

* Filed Oct 22 1991

* 11/5/91 Denied Donohue
Attest: Kevin M. Golden /s/, Asst. Clerk

* 1/7/92 Notified Atty Perry/L.L. /s/

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

WORCESTER SUPERIOR COURT

DOCKET NO: 91-0482

COMMONWEALTH OF MASSACHUSETTS	)	
	)	MOTION FOR A REQUIRED FINDING OF NOT GUILTY
v.	)	
RALPH J. ABRAMO, JR., Defendant	)	

NOW COMES THE DEFENDANT in the above-captioned case and moves this Honorable Court, pursuant to, consistent with and under the purview of Mass. R. Crim. P. 25, to enter a Required Finding of Not Guilty of the offense charged in indictment number 91-0482 on the grounds that:

A. The evidence is insufficient, as a matter of law, to sustain the conviction on the offense set forth in the referenced indictment.

B. M.G.L. C.265 § 13(B), when utilized

in conjunction with the numerous statutes set froth below, itself violates, as do the referenced statutes, the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment of the United States Constitution.

FACTUAL BACKGROUND

The Defendant, Ralph J. Abramo, Jr., was convicted on August 29, 1991 for violating M.G.L. C.265 § 13(B) by a jury of twelve in the Worcester Division of the Superior Court Department of the Trial Court. The Court (Donohue, J. presiding) sentenced the Defendant to a term of 2 to 5 years at MCI Concord. The Defendant commenced the execution of his sentence on the referenced date.

The Defendant, Ralph J. Abramo, Jr., is a male person who resided at 342 Cooper Road, Northbridge, Worcester County, Massachusetts and had, prior to August

29, 1991, never been convicted of committing any felony or misdemeanor by any State, Commonwealth, Territory, Protectorate, the Federal Government, a Foreign Country or Foreign State.

As grounds in support of the within motion the Defendant states and avers as follows:

* A true copy by photostatic process. Attest: Karen A. Zona /s/, Dep. Asst. Clerk

* 11/5/91 denied Donohue Attest: Kevin M. Golden /s/, Asst. Clerk

* 1/7/92 Notified Atty Perry/L.L./s/

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT DEPARTMENT
WORCESTER DIVISION
DOCKET NO: 91-0428

RALPH J. ABRAMO, JR., Petitioner vs. LARRY E. DUBOIS, COMMISSIONER OF THE DEPARTMENT OF CORRECTION AND PAUL L. DIPAULO, SUPERINTENDANT OF THE MASSACHUSETTS CORRECT	VERIFIED PETITION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM

Comes now the Petitioner in the above entitled matter and moves this Honorable Court to issue a Writ of Habeas Corpus Subjiciendum, pursuant to, consistent with and under the purview of M.G.L. c.248 § 1 permanently releasing the prisoner from physical custody of the below referenced individuals.

Consistent with the dictate of M.G.L. c.248 § 3, the Petitioner states and

avers as follows:

A. Location of Confinement - The Petitioner is currently imprisoned at the Massachusetts Correctional Institute, Concord situated at 965 Elm Street, Concord, Middlesex County, Massachusetts.

B. Individuals Imposing Confinement - The Petitioner is presently subjected to incarceration by Larry E. Dubois and Paul DiPaulo who are the Commissioner of the Massachusetts Department of Correction and the Superintendent of the Massachusetts Correctional Institution, Concord, respectively.

C. Prisoner's Name - This prisoner's name is Ralph J. Abramo, Jr. and he formerly resided at 342 Cooper Road, Northbridge, Worcester County, Massachusetts.

D. Cause of Incarceration - The prisoner was convicted of violating M.G.L. c.265 § 13(B) on August 29, 1991 and sentenced on such date to a term of incarceration between two (2) to five (5) years to be executed at the Massachusetts Correctional Institution, Concord (hereinafter "the conviction"). The petitioner commenced execution of such sentence at the referenced institution on August 29, 1991.

*A true copy by photostatic process.
Attest: Karen A. Zona /s/, Dep. Asst. Clerk

*11/5/91 denied Donohue
Attest: Kevin M. Golden /s/, Asst. Clerk

*1/7/92 Notified Atty Perry/L.L. /s/

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT

OF THE TRIAL COURT

Worcester, ss. **Criminal**

L.S. **No. 91-0482**

To the Sheriff of our County of Worcester, or any of his Deputies, and to the Superintendent of the Massachusetts Correctional Institution, Concord,

Greeting:

Whereas, by consideration of our Justices of our Superior Court Department, begun and holden of the transaction of Criminal Business, at Worcester within and for our County of Worcester aforesaid on the first Monday of August in the year of our Lord one thousand nine hundred and ninety-one.

RALPH J. ABRAMO, JR.

in our county of Worcester aforesaid, now in custody of the said Sheriff, convict of the crime of:

Indecent Assault and Battery on Child Chapter 265, Section 13B victim/witness fee $50.00 to be paid while incarcerated on the nineteenth day of the session of the same Court, being the twenty-ninth day of August, in the year of our Lord one thousand nine hundred and ninety-one *was sentenced to be confined in the said Massachusetts Correctional Institution, Concord,* five (5) years there to be held, disciplined and employed according to its rules and regulations and the statutes in that behalf duly made and provided, and the said Court did order him to stand committed, until he should be removed in execution of said sentence; and the Court further ordered that the prisoner is deemed to have served a portion of said sentence, such portion to be equivalent to the period of time from no credit Chapter 279, Section 33A

We therefore Command you, the said Sheriff, or any of your Deputies, forthwith to remove the said convict from our Jail in West Boylston aforesaid, to our said Massachusetts Correctional Institution, Concord and him safely deliver to the Superintendent thereof; and We also command you the said Superintendent of our said Massachusetts Correctional Institution, Concord to receive the said Convict and him to *imprison and employ in and within the precincts of the said Massachusetts Correctional Institution, Concord* agreeably to the sentence aforesaid; and for so doing this shall be a sufficient warrant. Hereof fail not and make return of this Warrant, with your doings thereon, to the office of the Clerk of our said Court in Worcester, aforesaid, as soon as may be.

Witness, ROBERT L. STEADMAN, Esquire at Worcester, this twenty-ninth day of August in the year of our Lord one thousand nine hundred and ninety-one.

Kevin M. Golden /s/

Assistant Clerk.

Copy

Attest R./s/

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT

OF THE TRIAL COURT

WORCESTER, SS. CRIMINAL

NO. 91-0482

COMMONWEALTH OF MASSACHUSETTS	)	
vs.	)	VERDICT SLIP
RALPH J. ABRAMO, JR.	)	

1. __ NOT GUILTY

2. X GUILTY - offense as charged.
Indictment Assault and Battery on a Child

~~3. __ GUILTY lesser included offense as follows:~~

Michelle R. Zvaeii Jones/s/
Signature of Foreman

VERDICT OF THE JURY returned and affirmed this 29th day of August, 1991.

Attest: Kevin M. Golden/s/
Assistant Clerk

Donohue J/s/
Associate Justice of the
Superior Court

Jud Kaye/s/
Court Reporter

A true copy by
photostatic process.
Attest: Karen A. Zona,
Deputy Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

WORCESTER,SS. SUPERIOR COURT
CRIMINAL DOCKET

Offense: INDECENT ASSAULT AND BATTERY ON CHILD 265/13B

Place: Northbridge

Surety and Amount:

Counsel: Christopher M. Perry and
Brendan J. Perry
95 Elm Street
P.O. Box 6938
Holliston, 3/21/91

Justice disposing of case: Donohue,J.

1991-March	7	1 INDICTMENT
		20 Plea Not Guilty
		Trial-3/25/91(Travers,J.)
		21 Defendant's Motion to Dismiss and Affidavit in Support and Memorandum in Support, filed and DENIED after Hearing (Travers, J.)(See Mo. #2 in case #91-0478)

Motion to continue Trial Date and Affidavit in Support, filed in court and this Motion will be addressed on 3/25/91 (Travers,J.)(See Mo. #3 in case #91-0478)

28 Pretrial Conference Report filed in court and Approved (Travers,J.)(See Mo. #4 in case #91-0478)

April 2 Demand for List of Jurors Pursuant to M.G.L. C. 277 S. 66, filed.(See Mo. #5 in case #91-0478)

Defendant's Motion to Dismiss and Affidavit in Support and Memorandum in Support, filed.(See Mo. #6 in case #91-0478)

8 Defendant's Motion for

Closure of Trial and Affidavit in Support and Brief, filed and DENIED - See Globe Newspaper Co. V. Superior Court, 383 Mass. 838 (1981) (Travers,J.)(See Mo. #7 in case #91-0478)

Defendant's Motion to Have the Three Alleged Victims Examined by a Licensed Psychiatrist or Psychologist and Affidavit in Support and Brief, filed and DENIED (Travers,J.) (See Mo. #8 in case #91-0478)

Defendant's Motion for Relief from the Prejudicial Joinder of Offenses Alleged to have

been Committed Against the Three Alleged Victims and Affidavit in Support and Brief, filed and DENIED (Travers,J.) (See Mo. #9 in case #91-0478) Defendant's Motion to Conduct Physical Examinations Upon the Alleged Victims and Affidavit in Support and Brief, filed and ALLOWED - The examination is to be arranged by Counsel(Travers,J.) (See Mo. #10 in case #91-0478) Defendant's Motion to Order the Commonwealth to Elicit Corroborating Testimonial Evidence at the time of Trial, Pursuant to the Fresh Complaint Doctrine, from

no more then one Individual, to the Extent that such Evidence exists and Affidavit in Support, filed and DENIED (Travers,J.)(See Mo. #11 in case #91-0478)

Motion in Limine and Affidavit in Support, filed and DENIED without Prejudice to objections on the same issues being raised in a specific context during trial. The Court, will not deal with such general issues prior to trial (Travers,J.) (See Mo. #12 in case #91-0478)

Mo. #6 - DENIED (Travers,J.)

23 Defendant's Motion to Appoint and Swear Court

Reporter, filed. (See Mo. #13 in case #91-0478)

24 Mo. #13 - ALLOWED at Defendant's Expense and Subject to Court Approval Qualification and Reporter to supply Transcripts to both parties (Travers,J.) Mo. #10 - Oral Motion to Reconsider - DENIED (Traver, J.)

26 Notice of Appeal, filed in court.(See Mo. #14 in case #91-0478)

May 13 Defendant's Motion to Continue, filed.(See Mo. #15 in case #91-0478)

14 Mo. #15 - ALLOWED to 6/-10/91(Hely,J.)

May 20 Motion to Restrict Physical Examination and Affidavit in Support, filed

in Court and ALLOWED (Hely,J.)(See Mo. #16 in case #91-0478)

Bill of Particulars, filed. (See Mo. #17 in case #91-0478)

29 Motion to Continue Trial, filed. (See Mo. #18 in case #91-0478)

August 29 Motion to Conduct Competency Hearings Prior to Jeopardy Attaching, filed. (See Mo. #19 in case #91-0478)

Motion to Sequester Jury, filed. (See Mo. #20 in case #91-0478) Motion to Sequester the Commonwealth's Witnesses, filed. (See Mo. #21 in case #91-0478)

Motion to Examine Each Perspective Traverse Juror Individually and out of Presence of all other Jurors and to Propound Certain Questions to each Juror, filed. (See Mo. #22 in case #91-0478)

Motion to Sequester the Commonwealth's witnesses during Voir Dire Examinations, filed. (See Mo. #23 in case #91-0478)

Defendant's Motion to conduct Individualized Voir Dire Examinations of the Commonwealth's Witnesses who will assumedly testify as to "Fresh Complaints" Allegedly having been made by Alleged Victims, filed.

(See Mo. #24 in case #91-0478)

First Motion in Limine to Exclude "Fresh Complaint" Testimony by Sergeant James M. Melia of the Northbridge Police Department, filed. (See Mo. #25 in case #91-0478)

Second Motion in Limine to Exclude "Fresh Complaint" Testimony by Sergeant James M. Melia of the Northbridge Police Department, filed. (See Mo. #26 in case #91-0478)

Third Motion in Limine to Exclude "Fresh Complaint" Testimony by Sergeant James M. Melia of the Northbridge Police De-

partment, filed. (See Mo. #28 in case #91-0478)

Fourth Motion in Limine to Exclude "Fresh Complaint" Testimony by Sergeant James M. Melia of the Northbridge Police Department, filed. (See Mo. #27 in case #91-0478)

Fifth Motion in Limine to Exclude Evidence of Prior Crimes, Wrongs or Acts, filed. (See Mo. #29 in case #91-0478)

Sixth (Assented to) Motion in Limine to Exclude Evidence Pertaining to Anal Intercourse and/or Anal Penetration, filed. (See Mo. #30 in case #91-0478)

Seventh Motion in Limine to Exclude Physician's Statements indicating that any of the Alleged Victims were Allegedly Sexually Assaulted or Raped, filed. (See Mo. #31 in case #91-0478)

Eighth Motion in Limine Excluding Evidence of Hearsay Statements indicting that any of the alleged victims, which M.G.L. C.233 S. 81(a) would Ostensibly admit, in the event said Victims are determined to be unavailable Pursuant to M.G.L. C.233 S. 81(b), filed. (See Mo. #32 in case #91-0478)

Ninth Motion in Limine to Preclude the Commonwealth from Arguing that the Complaining witness would not "Go through this (The Trauma) of a Trial unless they and/or she were/was, respectively, telling the truth, filed. (See Mo. #33 in case #91-0478)

Tenth Motion in Limine Pertaining to Instructions of Unnatural Sexual Intercourse filed in court. (See Mo. #34 in case #91-0478)

Eleventh Motion in Limine to Order the Commonwealth, or its Witnesses, from Referring to the Complaining Witnesses as

"Victims", filed. (See Mo. #35 in case #91-0478) Defendant's Request for Final Jury Instructions, filed. (See Mo. #36 in case #91-0478)

2 Motion for a Required Finding of Not Guilty, filed in court and DENIED (Donohue,J.)

3 Verdict - GUILTY

Sentence: 5 yrs. M.C.I. Concord, No Credit Chapter 279 Section 33A (Donohue,J.) Victim/Witness fee $50.00 to be paid while incarcerated

Mittimus issued

Sept. 6 4 Motion for a Required Finding of Not Guilty and Affidavit in Support and

			Memorandum in Support, filed.
		16	Transcripts Received (2 Volumes)
		18 5	Verified Petition for a Writ of Habeas Corpus Ad Subjiciendum and Affidavit in Support and Memorandum in Support, filed.
		26 6	Notice of Appeal, filed.
Oct.		22 7	Defendant's Mass. R. Crim. P. 30 Motion for Post Conviction Relief and Affidavit in support and Memorandum in Support, filed.
Nov.		5	Mo. #4 - DENIED (Donohue, J.)
			Mo. #5 - DENIED (Donohue, J.)
			Mo. #7 - DENIED (Donohue, J.)

Dec. 2 8 Notice of Appeal, filed.

A true copy by photostatic process.

Attest: Karen A. Zona, Deputy Assistant Clerk

Supreme Judicial Court for the
Commonwealth of Massachusetts
1412 Courthouse
Boston, Massachusetts 02108
(617) 725-8055

Brendan J. Perry, Esquire
Brendan J. Perry & Associates
95 Elm Street
PO Box 6938
Holliston MA 01746

RE: Docket No. FAR-06437

COMMONWEALTH

vs.

RALPH J. ABRAMO, JR.

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on February 8, 1993, the above-captioned Application for further Appellate Review was denied.

Jean M. Kennett, Clerk

Dated: February 8, 1993

To: Katherine E. McMahon, A.D.A.
Brendan J. Perry, Esquire

Orders.

February 8, 1993

Further Appellate Review Denied:

Commonwealth vs. Ralph J. Abramo, Jr.

Reported below: 33 Mass. App. Ct. 1119 (1992).

No..... DUPLICATE

THE COMMONWEALTH OF MASSACHUSETTS

PAROLE BOARD

CERTIFICATE OF PAROLE

KNOW ALL MEN BY THESE PRESENTS:

It having been made to appear to the Massachusetts Parole Board that Ralph J. Abramo Jr. No. C-56437 a prisoner sentenced to the Massachusetts Correctional Institution at Concord is eligible to be paroled, and the matter having been given careful consideration, it is, therefore ordered by the said Parole Board that the said prisoner be released on parole and permitted to be at liberty during the unexpired portion of the sentence which expires on the 28th day of August, 1996.

BE IT ALSO KNOWN that this permit to be at liberty is granted upon condition

that the said prisoner has agreed to observe and perform all of the rules and covenants shown on the reverse of this certificate, all of which are hereby made and agreed to be conditions precedent to said prisoner's release.

Dated at Boston, this 4th day of February, 1993.

By order of the PAROLE BOARD

By.....
Chairman

Massachusetts Parole Board

The above named prisoner was released on this 4th day of February 1993 from the Pondville Correctional Center.

/s/

.....
Superintendent

READ CAREFULLY THE FOLLOWING CONDITIONS UNDER WHICH THIS PAROLE IS GRANTED

These conditions of parole are designed to provide guidance for a parolee in his everyday conduct so as to facilitate his transition to the community and at the same time to safeguard legitimate community interests. They will be implemented with the flexibility appropriate to individual needs and circumstances and with due regard for basic human dignity. To insure these goals, it is expected that a parolee will be available at reasonable times for consultation with his parole officer.

PAROLE CONDITIONS

I. I will obey local, state, and federal laws; and conduct myself in the manner of a responsible citizen.

II. I will notify my parole officer in writing within 24 hours of any changes in my employment or residence. I will notify my parole officer before applying for a license to marry. I will inform my parole officer within 24 hours if arrested.

III. I will make earnest efforts to find and maintain legitimate employment, unless engaged in some other program approved by my parole officer.

IV. I will not engage in a continuous pattern of association with persons I know to have a criminal record, or who are known to be engaged in a violation of law. This prohibition does not apply where such association is INCIDENTAL to my place of residence or employment, or

connected with activities of a bonafide political or social organization. However, the parole board retains authority to impose limits to these latter activities as a special condition of parole where such association is inconsistent with my approved parole plan.

V. I will not leave the state of Massachusetts for periods in excess of 24 hours without securing permission from my parole officer.

VI. Special conditions of my parole: (if warranted, may be imposed subsequent to my date of release.)

VII. I will not serve as an informant or special agent for any law enforcement agency.

a) None

b) Supervise for Drugs. Supervise

for Liquor Abstinence.

No Unsupervised Contact with Children under 16 Yrs.

c) No Contact with Biological Children Except as Approved By the Court.

d) Report to Regional Parole Office Day of Release at 12:00 Noon.

I Hereby Certify that I fully understand the above conditions under which I am being released and agree to faithfully observe the same.

Ralph J. Abramo, Jr./s/
Signature of Parolee

Dated: 2 - 4, 1993

Witness.

...../s/....
Special State Police Officer
Official Title

Federal Constitutional Provisions

Amendment XIV [1868]

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Statutory Provisions

28 U.S.C. § 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which

a decision could be had, may be reviewed by the supreme court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 3. Complaint and Indictment; Waiver of Indictment

(Applicable to District Court and Superior Court)

(a) **Commencement of Criminal Proceeding.** A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which he has the right to be proceeded against by indictment and requests a probable cause hearing, that request shall constitute a waiver of the right to be proceeded against by indictment and the Commonwealth may proceed upon the complaint.

No criminal proceeding shall be commenced against a juvenile unless proceedings against him as a delinquent child have been begun and dismissed as required by the General Laws.

(b) **Indictment**

(1) Right to Indictment. A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the District and Superior Courts unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.

(c) **Procedure Upon Waiver of Indictment in District Court.**

(1) In General. If the District Court declines jurisdiction over an

offense within its concurrent jurisdiction as to which there is a right to be proceeded against by indictment, or if a defendant is arraigned upon a charge over which the District Court has no jurisdiction, the judge shall advise the defendant that he may waive indictment and proceed upon the complaint. No defendant shall waive the right to be proceeded against by indictment unless he is represented by counsel or has waived counsel. A defendant shall not waive the right to be proceeded against by indictment and elect a probable cause hearing except by filing in court, on the return day or at such other time as the court may order, a written waiver of that right and a request for a probable cause hearing. The court may for cause shown grant relief from that waiver.

(2) Transmission of Papers. If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

(d) **Waiver of Indictment in Superior Court.** Notwithstanding the failure of a defendant to file a written waiver of the right to be proceeded against by indictment and request for a probable cause hearing in the District Court, the defendant may with the consent of the prosecuting attorney waive that right and elect to proceed upon the complaint in the Superior Court. The waiver shall be in writing and filed in the Superior Court.

(e) **Indictment after Waiver.** Notwithstanding the defendant's waiver of the right to be proceeded against by indictment and request for a probable cause hearing, the prosecuting attorney may proceed by indictment.

Rule 30 - Post Conviction Relief

(Applicable to District Court and Superior Court)

(a) Unlawful Restraint. Whoever is imprisoned or restrained of his liberty pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or to correct the sentence which he is then serving upon the ground that his confinement or restraint was imposed in violation of the Constitution or laws or the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of law.

(c) Post Conviction Procedure.

(1) *Service and Notice.* The moving party shall serve the District Attorney with a copy of any motion filed under this rule; the moving party shall serve the Attorney General with a copy of any motion filed under subdivision (a) of this rule.

(2) *Waiver.* All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in his original or amended motion. Any grounds not so raised are waived unless the judge in his discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) *Affidavits.* Each moving party shall file and serve and each party

opposing a motion may file and serve affidavits where appropriate in support of his respective position. The judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) *Discovery.* Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party may authorize such discovery as is deemed appropriate and as would be available in civil cases, subject to appropriate protective order.

(5) *Counsel.* The judge in his discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in

the preparation and presentation of motions filed under subdivisions (a) and (b) of this rule.

(6) *Presence of Moving Party.* A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) *Place of Hearing.* All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever he is then sitting.

(8) *Appeal.* An appeal from a final order under this rule may be taken to the Appeals Court by either party. If an appeal is taken:

(A) The defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the

discretion of the judge, be admitted to bail pending decision of the appeal.

(B) upon written motion supported by the affidavit the Appeals Court may determine and approve payment to the Defendant of his costs of appeal together with reasonable attorney's fees, to be paid on the order of the trial court after entry of the rescript. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of this matter.

G.L. c.126, § 8. **Establishment** (Houses of Correction)

The county commissioners in each county, except Dukes, shall at the expense of the county provide a house or houses of correction, suitably and efficiently ventilated, with convenient yards, workshops and other suitable accommodations adjoining or appurtenant thereto, for the safe keeping, correction, government and employment of offenders legally committed thereto by the courts and magistrates of the Commonwealth or of the United States.

G.L. c.218, § 26. **General Provisions.**

The District Courts and the Municipal Court of the city of Boston shall have original jurisdiction, concurrent with the Superior Court, of the following offenses, complaint of

which shall be brought in the division of the District Court Department, or in the Boston Municipal Court Department, as the case may be, within which judicial district the offense was allegedly committed or is otherwise made punishable: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes listed in paragraph (a) of section twenty-four G and paragraph (1) of section twenty-four L of chapter ninety, paragraph (a) of section thirty-two and paragraph (a) of section thirty-two A and section thirty-two J of chapter ninety-four C, section fifteen A of chapter two hundred and

sixty-five and sections sixteen, seventeen, eighteen, nineteen, twenty-eight, forty-nine and one hundred and twenty-seven of chapter two hundred and sixty-six, and the crimes of malicious destruction of personal property under section one hundred and twenty-seven of chapter two hundred and sixty-six, indecent assault and battery on a child under fourteen years of age, escape or attempt to escape from any penal institution, forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

G.L. c.218, § 27. **Imposition of Penalties.** [District Court]

They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison.

G.L. c.218, § 30. **Binding Over to Superior Court.** [District Court]

They shall commit or bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. If such a person is committed for failure to recognize as ordered, the superior court shall thereupon have jurisdiction of the

case against such person for the purpose of revising the amount of bail theretofore fixed.

G.L. c.265, § 13B. **Indecent Assault and Batter on a Child Under Fourteen**

Whoever commits an indecent assault and battery on a child under the age of fourteen shall be punished by imprisonment in the state prison for not more than ten years, or by imprisonment in a jail or house of correction for not more than two and one-half years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or any term of years.

No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or

employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

G.L. c.265, § 23. **Rape and Abuse of a Child Under 16**

Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the

state prison for life or for any terms of years, but not less than five years.

G.L. c.274, § 1. **Felonies and Misdemeanors.**

A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

G.L. c.279, § 23. **Limitation of Sentences of Males to Jails or Houses of Correction [District Court]**

No sentence of a male convict to imprisonment or confinement for more than two and one half years shall be executed in any jail or house of correction.

G.L. c.279, § 33. **Term of Sentences to Massachusetts Correctional Institution, Concord.**

Whoever is sentenced to the Massachusetts Correctional Institution,

Concord for larceny of property of a value exceeding one hundred dollars or for any felony may be held therein for not more than two and one half years unless sentenced for a longer term, in which case he may be held therein for such longer term; if sentenced to said Massachusetts Correctional Institution, Concord for larceny of property of a value not exceeding one hundred dollars, he may be held therein for not more than two years; if sentenced to said Massachusetts Correctional Institution, Concord for any other offense, he may be held therein for not more than the maximum term fixed by law for the punishment of the offense of which he has been convicted.

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